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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-733

Harvey H. Allen and Simona A. Allen,

Petitioners

vs

State Board of Education of North Carolina et al.,

Respondents

****

REPLY BRIEF OF PETITIONERS

****

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Petitioners, Harvey H. Allen and Simona A. Allen, file this Reply Brief pursuant to Rule 24(4) of the Rules of this Court, which reads:

> "Reply briefs addressed to arguments first raised in the briefs in opposition may be filed, but distribution under paragraph 3 hereof will not be delayed pending the filing of such briefs."

I
MEANING OF WORD "VALIDITY"

The Briefs in Opposition to certiorari for the first time focus upon the meaning of the word "validity", advancing the contention that, despite this Court's decision in Adickes v S.H. Kress & Co., 398 U.S. 144,153, the District Court could enter and the Court of Appeals affirm a valid summary judgment without hearing any evidence to support Respondents' "burden of showing the absence of a genuine issue as to any material fact" (398 U.S. at 157). On Page 16 of the Brief in Opposition of Respondent Winston-Salem/Forsyth County Board of Education it is said:

> "The decision was that the Complaint presented no issue as to the validity of the bonds; no evidence was required to prove what the Complaint said."

A contrary view of the meaning of the

word "validity" in the context of this case, as admitted on Page 3 of said Brief in Opposition, is that taken by Respondents' own experts, namely, bond counsel employed by Respondents, who have found in the "allegations of the complaint" sufficient question as to the "validity" of the bonds in a Court of Equity to refuse to issue bond counsel's "no litigation" certificate.

When this position of Respondents' own bond counsel experts is coupled with the relief sought by Petitioners that issuance and sale of the bonds be enjoined "except pursuant to a plan approved in advance by" the Court of Equity, it seems clear to Petitioners that the record disclosed issues as to material facts concerning "validity" of the bonds in Equity which Respondents failed to demonstrate the absence

of, as required by the Adickes case, supra.

The word "validity" is not a word of art. One meaning may attach to bonds in the hands of innocent purchasers for value. The meaning may vary in a Court of Equity before a school bond issue has been sold. In Swann v Charlotte-Mecklenburg, 28 L. Ed.2d at 566, this Court said:

> "Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." (Emphasis is added.)

"Past wrongs" in school construction in this case are abundant. (See Pages 25-27 of Petition for Certiorari.)

II
WAS THERE SUMMARY JUDGMENT?

For the first time (Page 13), said Brief in Opposition suggests that the final judgment here involved was really not a summary judgment after all, but "was in the nature of a judgment on the pleadings."

This obvious effort to avoid this Court's Adickes decision will not wash for two simple reasons: (1) the motion for that judgment ("Exhibit D" of the Petition for Certiorari) moved "That final Summary Judgment be entered" and (2) the decision of the Court of Appeals ("Exhibit A" of the Petition for Certiorari) says, "The District Court granted a partial summary judgment."

The final judgment here involved could not be a judgment on the pleadings, because Rule 12 of the Federal Rules of Civil Procedure provides in part that a motion for judgment on the pleadings may be filed only "After the pleadings are closed."

Since the Respondents Winston-Salem/Forsyth County Board of Education and City of Winston-Salem have not even yet filed any answers, the pleadings still are not

closed in this case.

In direct answer to Adickes, it is said on Page 16 of the Board of Education's Brief in Opposition that "The Adickes case involved a summary judgment which decided the entire claim on the merits." But Adickes itself says, 398 U.S. at 148, that the summary-judgment claim "was dismissed before trial on a motion for summary judgment," which is exactly what happened in this case.

III

NO DUPLICATION OF SCOTT

Both Briefs in Opposition (Page 12 of that by Winston-Salem/Forsyth County Board of Education and City of Winston-Salem) and (Page 9 of that by the Board of County Commissioners), emphasize an alleged duplication of the so-called Scott case, No. 71-274 of the October, 1971 Term of the Supreme Court of the

United States. The only document in the Scott case which even mentions the $24.8 million bond issue here involved was a motion filed in the Scott case on January 13, 1969 by the plaintiffs in the District Court, in which motion said plaintiffs sought to add to their complaint a challenge of the $24.8 million bond issue. That motion was denied by the District Court and no question as to that decision was raised on appeal.

In connection with the Scott case, on September 9, 1971 Respondent Winston-Salem/Forsyth County Board of Education filed in that case in the District Court a motion which asked the District Court to "reconsider and vacate its Orders of June 22, 1971, and July 26, 1971, and that Winston-Salem/Forsyth County Board of Education not be required to operate its school system under the 'Revised

Pupil Assignment Plan for the 1971-72 School Year' as directed in said July 26, 1971, Order." The Orders sought to be vacated are among the Orders which the Chief Justice declined to stay in his Opinion of August 31, 1971, and which this Court later declined to grant certiorari to review.

No mention is made of the $24.8 million bond issue here involved in that motion to vacate Orders of the District Court. But said motion does rely almost entirely upon said Respondent's interpretation of the views of the Chief Justice as expressed in his Opinion of August 31, 1971, the motion saying among other things (at Page 4):

> "It appears clear from his opinion denying the application for a stay in this case that he does not believe that the Board of Education was required to achieve the results de-

creed by this Court's orders of June 22 and July 26, 1971."

The Opinion of the Chief Justice denying a stay on August 31, 1971 is pertinent to this case. (See Pages 36 and 45 of the Petition for Certiorari.)

Respectfully submitted,

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